(9)

No. 91-636
IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.
Petitioner,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND DIRECTOR OF THE DEPARTMENT

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QUESTION PRESENTED

WHERE A COMPREHENSIVE STATE-WIDE SOLID WASTE MANAGEMENT STATUTE REQUIRES EACH OF MICHIGAN'S 83 COUNTIES TO ASSURE PROPER DISPOSAL OF ALL SOLID WASTE WITHIN THE COUNTY AND TO CREATE ADDITIONAL DISPOSAL CAPACITY WHERE NECESSARY, AND IT IS UNDISPUTED THAT SOME COUNTIES DO IN FACT ACCEPT OUT-OF-STATE WASTE, DOES THE STATUTE ON ITS FACE VIOLATE THE COMMERCE CLAUSE BY PERMITTING EACH COUNTY TO DETERMINE WHETHER IT WILL ACCEPT OUT-OF-COUNTY WASTE?

PARTIES TO THE PROCEEDING

In addition to the Petitioner and Respondent Michigan Department of Natural Resources whose names appear on the caption to the case, the following are also Respondents in this Court: Roland Harmes, the current Director of the Michigan Department of Natural Resources (who has been automatically substituted pursuant to Supreme Court Rule 35.3 for his predecessor in office, David Hales, who was listed as a defendant in the District Court and Court of Appeals); the St. Clair County Health Department; Jon B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. History of the Proceedings 1

B. The State And Federal Statutory Framework 5

1. The Michigan Solid Waste Management Act 5

2. The Resource Conservation And Recovery Act Of 1976 15

SUMMARY OF ARGUMENT 18

ARGUMENT

I. THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE 27

A. The Appropriate Level Of Scrutiny 27

B. The Purpose Of The Solid Waste Management Act Is To Address Important Matters Of Legitimate Local Concern 38

Page

C. The Solid Waste Management Act Is Not An Economic Protectionist Measure And Regulates Evenhandedly 54

D. The Solid Waste Management Act Is Not Discriminatory On Its Face And Imposes At Most Only An Incidental Burden On Interstate Commerce 70

E. There Are No Reasonable Nondiscriminatory Alternatives To Protect The Local Interests ... 82

II. BECAUSE OF THE MARKET PARTICIPANT DOCTRINE AND PRINCIPLES OF STATE SOVEREIGNTY, THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE 91

CONCLUSION 103

TABLE OF AUTHORITIES

Pages

Cases

Baldwin v G.A.F. Sealing, Inc.,
294 U.S. 511 (1935) 28,68

Brimmer v. Rebman,
138 U.S. 78 (1891) 67,68

Brown-Forman Distillers Corp. v.
New York State Liquor Authority,
476 U.S. 573 (1986) 37

California Reduction Co. v.
Sanitary Reduction Works of
San Francisco,
199 U.S. 306 (1905) 25,54,59,61

Cascade Twp. v. Cascade Resource
Recovery Inc., 118 Mich. App. 580;
325 N.W.2d 500 (1982) 44

Dafter Twp. v. Reid, 159 Mich.
App. 149; 406 N.W.2d 255
(1987), lv. to appeal den.
429 Mich. 880 (1987) 50,75

Dean Milk Co v. Madison,
340 U.S. 349 (1951) 67-70

Diamond Waste, Inc. v. Monroe
County, 939 F.2d 941
(11th Cir. 1991) 76,77

Evergreen Waste Systems, Inc. v.
Metropolitan Service District,
820 F.2d 1482 (9th Cir. 1987) 75,76

Pages

Fort Gratiot Charter Twp. v. Kettlewell, 150 Mich. App. 648; 389 N.W.2d 468 (1986), lv. to appeal den. 426 Mich. 867 (1986) 47,49,56

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 96,98

Gardner v. Michigan, 199 U.S. 325 (1905) 25,54,60,61

H.P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525 (1949) 28

Hughes v Alexandria Scrap Corp., 426 U.S. 794 (1976) 92-94

Hughes v. Oklahoma, 441 U.S. 322 (1979) .....passim

Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) 33

Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981)..54,60,61

Kettlewell v. Michigan Dep't. of Natural Resources, 732 F. Supp. 761 (E.D. Mich. 1990), aff'd 931 F.2d 413 (6th Cir. 1991)..4,5,65-67

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 32

Lyon Development Co. v. Dep't. of Natural Resources, 157 Mich. App. 190; 403 N.W.2d 78 (1986) ...21,42

Pages

Maine v. Taylor,
477 U.S. 131 (1986) .....passim

Minnesota v. Clover Leaf Creamery
Co., 449 U.S. 456 (1982) 61,62,74

National League of Cities v.
Usery, 426 U.S. 833 (1976) 96

New Energy Co. of Indiana v.
Limbach, 486 U.S. 269 (1988) ....passim

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 79

Philadelphia v. New Jersey,
437 U.S. 617 (1978) .....passim

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 29,77,92

Polar Ice Cream and Creamery Co.
v. Andrews, 375 U.S. 361 (1964) .. 68

Reeves, Inc. v. Stake,
447 U.S. 429 (1980) .....passim

Robertson v. California,
328 U.S. 440 (1946) 32

Saginaw County v. Sexton Corp.,
150 Mich. App. 677; 389 N.W.2d
144 (1986), lv. to appeal den.
426 Mich 867 (1986) .....passim

South Carolina State Highway
Dep't. v. Barnwell Bros., Inc.,
303 U.S. 177 (1938) 74

Pages

Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. 39; 372 N.W.2d 678 (1985) 41,43,75

Sporhase v. Nebraska, 458 U.S. 941 (1982) .....passim

Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d 245 (3rd Cir. 1989), cert. den. 493 U.S. 1077 (1990) 51,52,80

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 79

Wyoming v. Oklahoma, ___ U.S. ___, 60 U.S.L.W. 4119 (1992) 30,37,71,82

Other Authorities

Mich. Comp. Laws Ann. § 299.410(1) 11,58

Mich. Comp. Laws Ann. § 299.413a 14

Mich. Comp. Laws Ann. § 299.413(2) 11,58

Mich. Comp. Laws Ann. § 299.425(1) 6,11

Mich. Comp. Laws Ann. § 299.425(2) 10

Mich. Comp. Laws Ann. §§ 299.426(1)(2) 9

Pages

Mich. Comp. Laws Ann.
§ 299.427(d) 9

Mich. Comp. Laws Ann.
§ 299.428(3) 10

Mich. Comp. Laws Ann.
§ 299.429 10

Mich. Comp. Laws Ann.
§ 299.430a 88

Mich. Comp. Laws Ann.
§ 299.430(1) 7,14

Mich. Comp. Laws Ann.
§ 299.430(4) 11

Mich. Comp. Laws Ann.
§ 299.432(1) 10

Mich. Comp. Laws Ann.
§ 299.432(4) 88

Mich. Comp. Laws Ann.
§§ 299.401-.437 5

Mich. Comp. Laws Ann.
§§ 299.501-.551 44

Mich. Comp. Laws Ann.
§ 325.291-.300 5

1982 Ann. Admin. Code
Supp. R 299.4307 63

1982 Ann. Admin. Code
Supp. R 299.4711 7,14

Pages

1982 Ann. Admin. Code Supp. R 299.4711(e)(i)(C) 9

1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(A) 12

1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(B) 13

1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(C) 48

42 U.S.C. §§ 6901-6949 15

42 U.S.C. §§ 6902, 6904, 6941, 6942 15

42 U.S.C. § 6942(b) 16

42 U.S.C. § 6942(c) 16,17

42 U.S.C. § 6946(c) 17

U.S. Const., art I, § 8, cl. 3 27

Fed. R. Civ. P. 56 4

Note: The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space, 67 Ind. L. J. 511 (Winter, 1992) 98

Shapiro, The Process of Resource Recovery Siting, 9 Seton Hall Leg. J. 403 (1983) 52

STATEMENT OF THE CASE

A. History of the Proceedings.

On February 10, 1989, Petitioner approached St. Clair County seeking an amendment of the initial county solid waste management plan prepared pursuant to the requirements of Michigan's Solid Waste Management Act. That plan had been prepared by county officials, subjected to public hearings, ratified by 67% of the municipalities within St. Clair County and approved by the director of the Michigan Department of Natural Resources on March 31, 1983. The St. Clair County plan did not permit the importation of out-of-county waste into the county. Petitioner's application for amendment of the county plan sought permission to import into the county an estimated 1,750 tons of out-of-county

solid waste per day. (Application for Concept Approval, Plaintiff's Brief in Support of Motion for Summary Judgment, Appendix, United States District Court, April 21, 1989. See Joint Appendix in United States Court of Appeals, p. 134.) At the time of the application, Petitioner was handling 500 tons a day of waste generated in St. Clair County. (Id., p. 136.) Petitioner estimated that with the additional 1,750 tons of waste per day and, with the use of 65 cubic yard trucks, 80 additional truck loads per day would be necessary in order to accommodate the increased waste flow. (Id., p. 144.)

The St. Clair County Metropolitan Planning Commission, an advisory body, evaluated the application and denied it.

The Solid Waste Planning Committee's staff report commented that:

> The solid waste quantities/volumes proposed (936,000 cu. yds./year) would use up all the Type II landfill capacity currently remaining in MDNR approved landfill plans for landfills located in St. Clair County (5,141,000 cu. yds.) within six years.
> (Id., p. 150.)

On March 13, 1989, Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan alleging that two sections of the statute violate the Commerce Clause on their face (Count I, JA10-JA15) and as applied (Count II, JA15-JA17) and that they constitute an unconstitutional taking of Petitioner's property without compensation (Count III, JA17). The complaint sought declaratory and injunctive relief (JA17-JA18). Respondents filed

answers to the complaint (JA25-JA32, JA33-JA39). On April 24, 1989, Petitioner filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56 (JA19-JA21). Respondents filed responses in opposition to the motion. On March 2, 1990, the District Court issued a memorandum opinion and order denying the request for declaratory judgment and the request for injunctive relief (732 F. Supp. 761; App. to Pet. for Cert. pp. 12a-21a). The court held that the statute does not discriminate against interstate commerce on its face and that in practical effect it imposes only an incidental burden on interstate commerce which is not clearly excessive in relation to the benefits derived by Michigan from the statute. On March 8, 1990, the court entered a judgment granting summary

disposition to Respondents on all counts. On appeal the United States Court of Appeals for the Sixth Circuit affirmed (931 F.2d 413; App. to Pet. for Cert. pp. 1a-11a).

In this Court, Petitioner has abandoned all claims except its argument that the statute violates the Commerce Clause on its face.

B. The State And Federal Statutory Framework.

1. The Michigan Solid Waste Management Act.

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401-.437, was enacted in 1978 and repealed the garbage and refuse disposal act, Mich. Comp. Laws Ann. §§ 325.291-.300, which governed licensing and regulation

of disposal facilities but did not require local planning or long-term solid waste management.

Under the Solid Waste Management Act, every Michigan county is required to prepare and periodically update a 20-year solid waste management plan which projects the amount of solid waste that will be generated within that county (or planning area) and provides for its disposal at facilities which comply with the act and the administrative rules promulgated thereunder. Mich. Comp. Laws Ann. § 299.425(1) provides:

> Sec. 25. (1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

Each county's solid waste management plan must meet the exhaustive mandates of Mich. Comp. Laws Ann. § 299.430(1) and the administrative rules promulgated thereunder, i.e., 1982 Ann. Admin. Code Supp. R 299.4711.[1] Mich. Comp. Laws Ann. § 299.430(1) calls for a thorough evaluation of the existing and projected waste generation rates in the planning area, current and projected disposal capacity in each county or planning area, and specific plans to cure any capacity shortfall.

The administrative rules promulgated under the Michigan Solid Waste Management Act require that the county plan establish the goals and objectives of the

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[1]This rule is set forth at p. 1a in the appendix to this brief.

maximum utilization of solid waste through resource recovery, including source reduction and source separation; a data base which includes an inventory of existing private and public facilities in the county; evaluation of existing solid waste management and disposal problems by type and volume of waste; demographics of the county including population densities and projected centers of solid waste generation; current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods; solid waste management system alternatives including resource conservation and resource recovery; alternative systems such as waste energy projects; and site selection criteria for disposal facilities. 1982 Ann. Admin. Code Supp.

R 299.4711(e)(i)(C). (App. pp. 5a-6a). Saginaw County v. Sexton Corp., 150 Mich. App. 677, 682; 389 N.W.2d 144 (1986), lv. to appeal den. 426 Mich 867 (1986).

A 14-member planning committee consisting of, inter alia, 4 representatives of the solid waste management industry and 1 representative of industrial waste generators, is appointed to assist a county in the preparation of a plan. Mich. Comp. Laws Ann. §§ 299.426(1)(2). Once a proposed plan is prepared, it is submitted to the director of the Department of Natural Resources, to each municipality in the county and to adjacent counties and municipalities that may be affected by the plan. Mich. Comp. Laws Ann. § 299.427(d). Public hearings are then conducted before final adoption

by the county. Mich. Comp. Laws Ann. § 299.428(3). After adoption by the county, the plan must then be approved by at least 67% of the municipalities within the county.

Following local approval, the county plan is submitted to the director of the Department of Natural Resources for his or her approval and, if approved, the county plan is incorporated as part of the state solid waste management plan. Mich. Comp. Laws Ann. §§ 299.429 and 299.432(1); Saginaw County v. Sexton Corp., 150 Mich. App. at 679. The plans are to be updated every five years. Mich. Comp. Laws Ann. § 299.425(2).

County plans must include an enforceable program and process to assure that the solid waste generated or to be

generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law. Mich. Comp. Laws Ann. § 299.425(1). As more fully explained later, the county assures sufficient disposal capacity through the county plans' preemption of inconsistent local ordinances which would prohibit or regulate the location or development of a solid waste disposal area. Mich. Comp. Laws Ann. § 299.430(4).

The director of the Department of Natural Resources regulates both the construction and operation of the disposal sites and facilities through the the issuance of construction permits and operating licenses. Mich. Comp. Laws Ann. §§ 299.410(1) and 299.413(2). A

construction permit or operating license may not be issued by the director if the disposal facility is contrary to an approved county solid waste management plan. Id.

To be consistent with the plan, the site must be either specifically identified or consistent with the plan's siting criteria. The county plans must identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update. 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(A). App. p. 8a. If specific sites cannot be identified for the remainder of the 20-year planning period by the county at the time the plan is developed, the plan must include specific criteria that guarantees the siting of necessary solid waste dis-

posal areas. 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(B); App. p. 8a. By modifying the sites identified or the siting criteria, the state and county are able to control the number and size of landfills necessary to meet the 20-year projection of disposal needs. Thus, while local regulations and laws inconsistent with the plan are preempted by the county plan, there remains the ability on the part of the local units of government and the county during the development of the plan to determine to some extent how much land will be consumed for disposal. Control of imports into the county is essential not only for planning but to control land usage.

The counties also control the quantity of out-of-county waste allowed to be

imported. The acceptance of solid waste that is not generated in the county must be "explicitly authorized" in the county solid waste management plan. Mich. Comp. Laws Ann. § 299.413a. The receiving county is required to determine the volume of all waste likely to be disposed of in the county in order to meet the 5-year and 20-year planning periods' requirements. Mich. Comp. Laws Ann. § 299.430(1). The administrative rules promulgated under the Act call for a determination of the volume of waste likely to be received. 1982 Ann. Admin. Code Supp. R 299.4711. App. pp. 1a-12a. The quantity of waste a county anticipates flowing to its landfills is to be ascertainable from the county plans. See, e.g., excerpt from Ontonagon County plan, App. p. 14a.

2. The Resource Conservation And Recovery Act Of 1976.

The Solid Waste Management Act was enacted in response to Congress' encouragement of solid waste planning on a state or regional level through the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6949. RCRA calls for states to plan for and properly manage waste through the development of solid waste management plans, e.g., 42 U.S.C. §§ 6902, 6904, 6941, 6942.

Under RCRA, each state has the primary role of waste management. Guidelines for the development and implementation of state waste plans are required by the Act of the administrator of the Environmental Protection Agency. 42

U.S.C. § 6942(b). Those guidelines were to include, inter alia:

> (2) characteristics and conditions of collection, storage, processing, and disposal operating methods, techniques and practices, and location of facilities where such operating methods, techniques, and practices are conducted, taking into account the nature of the material to be disposed;
>
> * * *
>
> (4) population density, distribution, and projected growth;
>
> (5) geographic, geologic, climatic, and hydrologic characteristics;
>
> (6) the type and location of transportation;
>
> (7) the profile of industries;
>
> (8) the constituents and generation rates of waste;
>
> (9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management.
> 42 U.S.C. § 6942(c).

Both RCRA and its rules recognize that waste is a local problem to be

addressed by local solutions. Interstate regional plans are envisioned only if the states, through their Governors, consent. 42 U.S.C. § 6946(c).

RCRA acknowledges that in order to plan for and implement a workable state or local solid waste management plan, one needs to know the area to be served, its population density, its distribution, the type of waste generated, the waste generation rates, the growth rates and other demographic factors. See 42 U.S.C. § 6942(c). RCRA envisions self-sufficiency among each of the states or regional waste planning areas. As stated by the administrator of the Environmental Protection Agency, William Reilly, in recent testimony before Congress:

> The existing national market in solid waste will continue to be necessary <u>in the short run</u> for effective

> management of solid waste, while states implement integrated waste management plans.

Resource Conservation and Recovery Act Amendments of 1991: Hearings Before the Sub. Comm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102nd Cong., 1st Sess., Pt. 2, at 496-497 (1991). (Emphasis supplied.)

SUMMARY OF ARGUMENT

Following this Court's decision in Philadelphia v. New Jersey, 437 U.S. 617 (1978), the passage of amendments to the Resource Conservation and Recovery Act and after decades of unsuccessfully dealing with its waste problems, the State of Michigan enacted the Solid Waste Management Act, a comprehensive regulatory act

calling for the proper management of waste through a state-wide solid waste management plan. The Act requires each of Michigan's 83 counties to assure the proper disposal of all locally generated waste. To the extent sufficient disposal capacity does not exist in a county, the Act and its rules require a county to allow the siting of sufficient disposal facilities to meet its projected waste needs.

In enacting the Solid Waste Management Act, the Legislature recognized that without measures to usurp municipal laws which would otherwise prevent the siting of sufficient disposal capacity in a county, solid waste planning and management would be futile. The Solid Waste Management Act provides that local laws,

such as zoning ordinances, which would impede the siting and operation of disposal facilities, may be preempted by the provisions of a county solid waste management plan which authorizes the location of a disposal facility at a particular site.

The Solid Waste Management Act allows a county to define the area to be managed. The statutes at issue do not prohibit the flow of waste into a county but do require the receiving county's prior authorization before the wastes are imported. This authorization process enables a county to properly plan for its waste disposal needs through its ability to identify out-of-county volumes of waste prior to their authorized receipt. It also allows a county to control

imports if it believes that sufficient planned capacity does not exist to serve others. The requirement that out-of-county waste be authorized before being imported to a disposal facility applies equally to both in-state and out-of-state waste.

Since Philadelphia, the waste business in Michigan and other states has become, in the words of a Michigan appellate court, a "highly regulated field". Saginaw County v. Sexton Corp., 150 Mich. App. at 685. The Solid Waste Management Act made "vast changes" in the governance of waste disposal. Lyon Development Co. v. Dep't. of Natural Resources, 157 Mich. App. 190, 194; 403 N.W.2d 78 (1986). Landfills are no longer considered natural resources but

are considered engineered or manufactured facilities capable of being sited without the need for unique geological conditions. Under the Act, landfills are allowed to exist only at the will of state and local governments. The state and county plans dictate the terms upon which disposal facilities exist, how they will be operated and the area that they will be able to serve. In this way, the local units of government and the state retain some control over local land use. The Act has been recognized as a limited preemption over local control and leaves to the discretion of each county the determination of how much waste it is willing to import and the importation's impact on land usage.

A free market flow of waste into a

county which has incurred the politically tough burden of dealing with at least its own waste problems is simply not fair nor tolerable. The free market flow of waste is the cause of any past and current waste crisis. "Free market flow" is synonymous with "let others solve my problem." Should the statutes at issue be held unconstitutional, the immediate reaction will be to reconstruct the parochial local measures that led to, or exacerbated, the waste problem in Michigan that is being remedied by the Solid Waste Management Act.

There is no prohibition to the importation of out-of-state waste into Michigan. In fact, Michigan is receiving out-of-state waste in accordance with the state solid waste management plan and the

plans of the receiving counties. Petitioner's complaint is directed at one Michigan county which concluded that it had insufficient capacity to accommodate the train loads of waste Petitioner sought to deposit in a landfill near Port Huron, Michigan. Petitioner did not, and could not, claim that Michigan law prohibited depositing the waste in every location in Michigan but, rather, challenges only St. Clair County's refusal to accept the waste. Respondents submit that any burden on commerce caused by the statutes are de minimis and clearly a result of a legitimate exercise of the rights of a sovereign state reserved under the Tenth Amendment. The statutes, and St. Clair County's actions, are not motivated by economic protectionism nor are they facially discriminatory.

Waste is so pervasively regulated and controlled by state law that its status as an article of commerce is questionable. Since at least early in this century, this Court has recognized the authority of government to take waste out of the stream of commerce and to displace private business with government owned or controlled entities. California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905). The very article of commerce that Petitioner wishes to import into St. Clair County could be pulled from the interstate market by governmental measures at its place of origin. The actual article of commerce being bought and sold here is landfill capacity and state and local governments are entitled to some control

over that capacity because of its heavy environmental, social and political costs. Those costs are being incurred in Michigan through its substantial effort to deal with a perplexing health and environmental problem. Landfill capacity in Michigan has all the "indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage." Sporhase v. Nebraska, 458 U.S. 941, 957 (1982). Under any level of scrutiny recognized by decisions of this Court, the Michigan statute does not violate the Commerce Clause. The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

ARGUMENT

I.

THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. The Appropriate Level Of Scrutiny.

The Commerce Clause provides: "The Congress shall have Power ... To regulate Commerce ... among the several States ... ." U.S. Const., art I, § 8, cl. 3. Despite this plain text, the Commerce Clause has been interpreted also to have a "dormant" or "negative" aspect which controls State action, Hughes v. Oklahoma, 441 U.S. 322, 326 (1979):

> The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation. The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often con-

> troversial evolution of rules to accommodate federal and state interests. (Footnotes omitted.)

The primary purpose of the Commerce Clause is to ensure that "our economic unit is the Nation." H.P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 537 (1949). As this Court has stated, "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Sealing, Inc., 294 U.S. 511, 527 (1935). Nor may a state "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

Analysis of the question whether a state statute violates the Commerce

Clause begins with an examination of the extent to which the statute discriminates against interstate commerce, either on its face or in effect. "The burden to show discrimination rests on the party challenging the validity of the statute," Hughes v. Oklahoma, 441 U.S. at 336. Depending on the nature and level of discrimination, this Court's decisions have indicated that either a strict scrutiny or a less rigorous level of scrutiny should be applied in determining whether the statute violates the Commerce Clause. The less rigorous level of scrutiny was enunciated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local

> benefits. * * * If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The extent of discrimination which must be demonstrated to invoke strict scrutiny has been variously described as "patent" (Philadelphia v. New Jersey, 437 U.S. at 624 (1978)); "affirmative[]" or "arbitrar[y]" (Maine v. Taylor, 477 U.S. 131, 138, 148 n. 19 (1986)); and "clear[]" (New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988); Wyoming v. Oklahoma, ___ U.S. ___, 60 U.S.L.W. 4119, 4124 (1992)).

This Court has said that state statutes which amount to nothing more than "simple economic protectionism" are sub-

ject to a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. at 624; Maine v. Taylor, 477 U.S. at 148. "Economic protectionism" was defined in New Energy Co. of Indiana v. Limbach, 486 U.S. at 273 as: "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

At the same time, however, the Court has recognized that even if a statute "restricts interstate trade in the most direct manner possible, ... this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of

"legitimate local concern," even though interstate commerce may be affected.'" Maine v. Taylor, 477 U.S. at 137-138, quoting from Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980). More than forty-five years ago in Robertson v. California, 328 U.S. 440, 458 (1946), this Court said: "For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." This principle was recently cited with approval in Maine v. Taylor, 477 U.S. at 148, n. 19. The Court also said, 477 U.S. at 151:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.

> As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," ... it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Nevertheless, if sufficient discrimination is shown (i.e., discrimination which is "clear," "affirmative," "arbitrary," or "patent"), "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hughes v. Oklahoma, 441 U.S. at 336, quoting from Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 353 (1977). In New Energy Co. of Indiana v. Limbach, 486 U.S. at 274, 278, the Court said that a statute which "clearly dis-

criminates" against interstate commerce may be struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism," and that "[o]ur cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

The burden is on the State to "credibly advance[]" justifications for the discrimination which are more than "implausible speculation" and are not merely a "sham" or a "post hoc rationalization." Philadelphia v. New Jersey, 437 U.S. at 624; New Energy Co. of Indiana v.

Limbach, 486 U.S. at 280; Maine v. Taylor, 477 U.S. at 149. These formulations clearly imply that if a State does come forward with such justifications, the burden of disproving them (i.e., of showing them to be mere speculation, sham, or post hoc rationalization) shifts to the party challenging the validity of the statute.

In Maine v. Taylor, 477 U.S. at 140-152, the Court made it plain that this portion of the Commerce Clause analysis is primarily factual in nature. Maine banned the importation of live baitfish because it sought to guard against environmental risks. This Court recognized that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite

the fact that they may ultimately prove to be negligible," 477 U.S. at 148. After extensive evidentiary proceedings the trial court found that there were no scientifically accepted techniques for the sampling and inspection of live baitfish and thus upheld the statute. This Court upheld that finding, despite "signs of protectionist intent," 477 U.S. at 148, and despite claims that adequate testing procedures could easily be developed, 477 U.S. at 147-148:

> A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. * * * "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." (quoting from the District Court decision, 585 F. Supp. 393, 397).

Despite a large body of precedent involving "dormant" or "negative" Commerce Clause issues, this Court has recognized that there is no "clear line" separating close cases on which of these two levels of scrutiny should apply. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986); Wyoming v. Oklahoma, 60 U.S.L.W. at 4124, n. 12. "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp., 476 U.S. at 579. Similarly, in Philadelphia v. New Jersey, 437 U.S. at 624, this Court said:

> The crucial inquiry, therefore, must be directed to determining whether [the state statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

Respondents submit that under either level of scrutiny, the Michigan Solid Waste Management Act is constitutional. The Act clearly addresses important matters of legitimate public concern; it has no economic protectionist purpose and regulates in-state and out-of-state commerce evenhandedly; it is not discriminatory on its face and any burden on interstate commerce is minimal and only incidental to its legitimate local purpose; and there are no reasonable alternative measures available which would have less burden on interstate commerce.

B. The Purpose Of The Solid Waste Management Act Is To Address Important Matters Of Legitimate Local Concern.

This Court's decisions have consistently recognized that protection of

health, the environment, and natural resources are legitimate local purposes for Commerce Clause analysis. New Energy Co. of Indiana v. Limbach, 486 U.S. at 279 ("Certainly the protection of health is a legitimate State goal"); Philadelphia v. New Jersey, 437 U.S. at 626 ("we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment."); Hughes v. Oklahoma, 441 U.S. at 337 ("We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."); Maine v. Taylor, 477 U.S. at 148 ("Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility

that they may ultimately prove to be negligible.").

Respondents submit that the Solid Waste Management Act as a whole, and the specific sections challenged by Petitioner, are not motivated by economics or by an intent to shift a burden onto others. The motive is to address a matter of traditional police power concern involving protection of the health and safety of Michigan's citizens and its environment. The Solid Waste Management Act is directed at assuring environmentally safe disposal capacity to meet current and future needs. It mandates that the State and each county plan for its waste needs and assure adequate disposal capacity. Although it may have incidental effects on interstate commerce

by preventing out-of-county waste from being disposed of in a particular county, its primary motivation is not to benefit in-state economic interests; rather it is to define the area to be served. Out-of-county and out-of-state needs may be accommodated in the county plans at the discretion of state and local officials. As stated in Saginaw County v. Sexton Corp., 150 Mich. App. at 679:

> The new act provided a comprehensive regulatory scheme imposing uniform, state-wide standards and procedures for solid waste disposal, transportation and planning and effectively preempted local control in this area, although significant opportunity for local involvement is built into the act. Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. 39, 45-46; 372 N.W.2d 678 (1985); House Legislature Analysis H.B. 6314, January 11, 1979.

The Solid Waste Management Act significantly altered the waste industry in

Michigan. The State's new regulatory measures were noted by the Michigan Court of Appeals in Lyon Development Co. v. Dep't. of Natural Resources, 157 Mich. App. 190, 194; 403 N.W.2d 78 (1986):

> Prior to 1979, disposal of waste was governed by the garbage and refuse disposal act, MCL 325.291 et seq.; MSA 14.435(1) et seq., which essentially provided merely that "disposal areas" be licensed to operate. With the enactment of the Solid Waste Management Act in 1978 came a substantial overhaul of the laws surrounding waste disposal, including the above-noted requirements for local planning and DNR approval of such plans, along with state licensing of construction and operation of sites. A reading of the act makes it apparent that the Legislature was cognizant of the vast changes it was making in the governance of waste disposal.
> (Emphasis added.)

Likewise, the Michigan Court of Appeals recognized the effect the Solid Waste Management Act had on previously

existing rights of landfill operators in Saginaw County v. Sexton Corp., 150 Mich. App. at 685:

> While defendant correctly asserts that private sector involvement in the business of solid waste disposal is expressly encouraged by the Legislature, we emphasize that the Legislature conditioned its encouragement on compliance with county plans, MCL 299.430(1)(f); MSA 13.29(30)(1)(f), and on compliance with the minimum requirements of Act 641. MCL 299.435; MSA 13.29(35). Defendant is a business engaged in a highly regulated field. It is charged with constructive knowledge of the regulatory scheme governing its operations. Under that scheme, defendant had opportunity to review the Saginaw County solid waste management plan prior to its adoption and approval and register any dissatisfaction at a public hearing or with any of the various governmental bodies required to approve the plan. (Emphasis added.)

In Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. 39, the court commented on the

similarity of the Solid Waste Management Act and the Hazardous Waste Management Act, Mich. Comp. Laws Ann. §§ 299.501-.551, in their preemption of local control over the siting and operation of disposal facilities:

> As with hazardous wastes, the management and disposal of solid wastes is clearly an area which demands uniform statewide treatment. In holding that the Hazardous Waste Management Act preempted local regulation, we said:
>
> > "The Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The Legislature, instead, gave the power to a centralized decision-maker who could act uniformly and provide the most effective means of regulating hazardous wastes." Cascade Twp. v. Cascade Resource Recovery Inc., 118 Mich. App. 580, 589; 325 N.W.2d 500 (1982).
>
> 144 Mich. App. at 45.

The court, quoting from the Michigan House Legislative Analysis, H.B. 6314,

January 11, 1979, noted one of the problems sought to be addressed by the bill which became the Solid Waste Management Act:

> It is widely thought that a new statute is necessary to regulate the transportation and disposal of solid waste in Michigan. Current efforts are hampered, it is said, by a lack of uniform standards and procedures, a lack of consistent requirements, a lack of cooperation between different levels of government, and by inadequate planning and enforcement. Some of the inadequacies of present efforts could be remedied by an increase in funds and personnel for planning and enforcement. Other inadequacies need to be addressed by establishing in statute and by rule a more comprehensive approach to solid waste management.
> 144 Mich. App. at 45-46.

The purpose behind the statutory provisions at issue in this case is to allow a county to identify and control the planning area it is to serve, as has been explained by the Michigan Court of

Appeals on two occasions. In Saginaw County v. Sexton Corp., 150 Mich. App. 677, Saginaw County sought an injunction prohibiting Sexton, an operator of a landfill in Saginaw County, from receiving Bay County waste at its facility since importation of out-of-county waste was inconsistent with the state-approved county solid waste management plan. The court stated:

> The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material.
>
> * * *
>
> While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether "the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land *** to accommodate the development and operation of solid waste disposal

areas". MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific landfill site is to be identified in its waste management plan.

If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641.
150 Mich. App. at 684-685.
(Emphasis added.)

In Fort Gratiot Charter Twp. v. Kettlewell, 150 Mich. App. 648; 389 N.W.2d 468 (1986), lv. to appeal den. 426 Mich. 867 (1986), the court upheld a lower court ruling that out-of-county waste could not be brought into St. Clair

County and disposed of in the Kettlewell landfill without the authority for doing so expressed in the county's solid waste management plan. The lower court found that the Solid Waste Management Act and the administrative rules promulgated thereunder prohibited inter-county disposal of waste unless both counties' solid waste management plans identified the site as required by 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(C). The Kettlewell landfill was only identified in the St. Clair County plan. The court held:

> Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local

> conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process.
> 150 Mich. App. at 653-654.
> (Emphasis added.)

An unregulated free market flow of waste into Michigan, or to any other state with statutes similar to Michigan's, would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process. Fort Gratiot v. Kettlewell, 150 Mich. App. at 654.

These decisions recognize the pervasive state-wide scope of the SWMA and the significance of rationally based local

planning. They recognize that control of importation by a county is essential in defining the planning area to be served while at the same time assuring that safeguards exist at the state level to prevent parochial decision-making.

Judicial safeguards exist as well. On at least one occasion, a Michigan court refused to enjoin a landfill operator from accepting waste from outside of the area authorized by the county plan where it was shown that the out-of-county waste would not compromise the county's capacity to handle anticipated waste over the next 20 years. Dafter Twp. v. Reid, 159 Mich. App. 149, 163-166; 406 N.W.2d 255 (1987), lv. to appeal den. 429 Mich 880 (1987).

Thus, Michigan's Solid Waste Management Act is genuinely aimed at the

legitimate goal of alleviating a garbage problem by means that do not transfer the burden onto the backs of the citizens of other states. A secondary purpose of the statute is to provide communities, which have found their means of local control over the siting and operation of landfills preempted by state law, with an ability to decide how much waste may be accommodated from other areas should expected capacity exceed the anticipated needs of the planning area.

This secondary purpose is as legitimate as the first. Landfills are not popular. As stated in Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d 245 (3rd Cir. 1989), cert. den. 493 U.S. 1077 (1990):

> Waste disposal is unlike some other natural resource industries in that few communities welcome the opening

> of a waste disposal site in their midst. The opening of the site is often viewed as a threat to property values and quality of life that is acceptable only because of the pressing need for waste disposal.[2]
> 883 F.2d at 253.

By controlling the service area, the county indirectly controls the need for future landfilling.

In Sporhase v. Nebraska, 458 U.S. 941 (1982), this Court invalidated one portion of a Nebraska statute which imposed a reciprocity restriction on the withdrawal of ground water for use in another State, but upheld three other portions of the statute which limited withdrawals

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[2]The court in Swin cites Shapiro, The Process of Resource Recovery Siting, 9 Seton Hall Leg. J. 403 (1983), and numerous other articles which explain the political resistance of communities to the potential siting of a landfill in its proximity.

only to those which were "reasonable," "not contrary to ... conservation," and "not otherwise detrimental to the public welfare." 458 U.S. at 955-958. In enunciating the reasons why these restrictions did not violate the Commerce Clause, this Court said, 458 U.S. at 956:

> Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. * * * First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens--and not simply the health of its economy--is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.

Regulation of waste, like the regulation of the use of water in times and

places of shortage for the purpose of protecting the health of its citizens, is at the core of a state's police power. California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905); Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981).

C. The Solid Waste Management Act Is Not An Economic Protectionist Measure And Regulates Evenhandedly.

Contrary to the arguments of Petitioner and Amicus Curiae National Solid Waste Management Association, Michigan has not cut itself off from the rest of the nation by enacting laws which close its borders. Michigan imports waste from Pennsylvania, Indiana, Ohio, Illinois, New Jersey and Wisconsin. Petitioner's

Brief, Appendix, pp. 1a-20a; Brief of Amicus Curiae, p. 4; App. to Respondents' Brief, pp. 13a-16a.)[3]

Whether the waste is from a neighboring county or a neighboring state, the importation must be authorized by the receiving county's plan. In this matter, all out-of-county waste is treated even-handedly regardless of origin. All out-of-county waste must, in the words of Amicus Curiae, survive a multi-tiered authorization process involving approval by local units of government, by the county and ultimately by the director of the Department of Natural Resources. The authorization process for disposal of

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[3]Petitioner's "comments" found in its appendix, which were not part of the record below, are inaccurate in part as explained in the Respondent's appendix.

out-of-state waste is no more onerous than that for out-of-county waste.[4] And, as evidenced by such cases as Fort Gratiot v. Kettlewell, supra, and Saginaw County v. Sexton Corp., supra, the statutes are being imposed upon intrastate commerce.

Petitioner mischaracterizes the Solid Waste Management Act as a means of hoarding what is left of landfill capacity. The fact is, the Act has caused the creation of capacity, just as envisioned and encouraged by the Resource Conservation and Recovery Act. The issue is one of

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[4]In Sporhase v. Nebraska, 458 U.S. at 953, this Court noted that because of the strict application of the state-imposed limitations upon intrastate transfers, an exemption for interstate transfers would be inconsistent with the ideal of even-handedness in regulation.

how much of a burden the state or local unit of government must reasonably undertake.

Under the Solid Waste Management Act, landfills are allowed to exist only by the explicit permission of the state and local units of government. Those units of government define the parameters under which the landfill will operate. Each county plan defines a service area. The county plan and the state regulations specify how the landfill will be constructed, how it will operate and when and how it will be closed. This is a far cry from the days of yesteryear when privately owned landfills more closely approximated other non-regulated business or industry. Amicus Curiae's analogy to timber producers, factories or quarries is off the mark.

Both Petitioner and Amicus Curiae correctly characterize the landfill as privately owned, but incorrectly conclude that it is entitled to operate free of state regulation that defines the service it is to provide. Petitioner's Brief, p. 32; Amicus Curiae's Brief, p. 27. The landfill at issue exists only because of the permission granted to it by the state and local units of government. The Solid Waste Management Act and the county plans do not "commandeer a local business" (Amicus Brief, p. 27), but instead define exactly how it will operate as a condition of doing business. Again, unless a landfill is authorized by a county plan, the director of the Department of Natural Resources may not issue a construction permit or operating license. Mich. Comp. Laws Ann. §§ 299.410(1) and 299.413(2).

This notion of unrestricted enterprise in the disposal business was dispelled in Saginaw County v. Sexton Corp., 150 Mich. App. at 685 (quoted earlier in this brief), where the court, in response to the landfill owner's argument that private sector involvement is expressly encouraged by the Solid Waste Management Act, noted that the Michigan Legislature's encouragement is conditioned on private sector compliance with county plans. The court held that one engaged in the disposal business in Michigan, "a highly regulated field", is charged with the constructive knowledge of the regulatory scheme. Id., p. 685.

The pervasiveness of state and local authority in this area is also recognized in California Reduction Co. v. Sanitary

Reduction Works of San Francisco, supra; Gardner v. Michigan, supra; and Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981), where those in the private sector found themselves out of business due to governmental actions. In fact, the waste industry often benefits from governmental regulation which assures the flow of waste to a facility or creates a privately owned monopoly. Here the State has not only demanded the creation of disposal sites, but has also facilitated their existence by preempting local laws.

The pervasiveness of state control is also reflected in the fact that the very waste that Petitioner sought to deposit in Michigan may be totally taken out of the interstate stream of commerce by the

police power measures of other states or local units of government. California Reduction Co., supra; Gardner v. Michigan, supra; Hybud Equipment Corp., supra.

Petitioner contends that the means by which Michigan pursues its purpose are as offensive as the means employed by New Jersey through statutes struck down by this Court in Philadelphia v. New Jersey, supra. The statute in that case was found to be based on discriminatory intent, the effect of which was to bar all out-of-state waste from being deposited in New Jersey. This Court characterized it as "a state law purporting to promote environmental purposes" but "in reality [constituting] 'simple economic protectionism.'" Minnesota v. Clover

Leaf Creamery Co., 449 U.S. 456, 471 (1982). The justification given for New Jersey's ban of waste at its borders was considered as "merely a sham or a 'post hoc rationalization.'" Maine, 477 U.S. at 148-149.

There are a number of factors which distinguish Philadelphia from this case. First, Michigan has undertaken a comprehensive approach to dealing with the waste problem by the Solid Waste Management Act which creates a state-wide waste management plan. While the director of the Michigan Department of Natural Resources may authorize a county to exclude waste from other areas, when viewed from a state-wide perspective, waste from out-of-state is in fact crossing Michigan's borders. Second, both

out-of-state waste and in-state waste are treated in the same manner by the statutes and, in the case of St. Clair County, neither out-of-state waste nor out-of-county waste is allowed to be disposed of at Petitioner's landfill. Third, the landfills created under the Solid Waste Management Act are not dependent on the natural resources of a state as in Philadelphia, but are facilities engineered to accommodate particular geological characteristics of its location. See 1982 Ann. Admin. Code Supp. R 299.4307 ("clay sites" versus "lined sites"). Fourth, the state and local units of government are not hoarding existing landfill capacity but, pursuant to their obligation under the Solid Waste Management Act and consistent with RCRA, are in the process of creating sufficient

capacity to meet disposal needs. Unlike New Jersey's efforts to save what was left of remaining capacity, Michigan's focus is now to control the flow of waste into a county in order to plan for, and regulate, the amount of additional disposal capacity it must assure.

Both the district court and the court of appeals recognized that New Jersey's ban on out-of-state waste was significantly dissimilar to St. Clair County's refusal to accept out-of-county waste as authorized by the Solid Waste Management Act. Both courts specifically noted that Petitioner had not alleged that state officials were acting to prohibit the importation of <u>all</u> out-of-state waste into the state:

> ... The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills

with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under City of Philadelphia v. New Jersey.
931 F.2d 413, 418.

... plaintiff has not alleged that this [state] official has used this authority to reject county plans proposing the importation of out-of-state waste.
Id., at 417 (9a-10a) quoting from Kettlewell v. Michigan Department of Natural Resources, 732 F. Supp. 761, 764 (E.D. Mich. 1990).

* * *

Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this

> official has used this authority to reject county plans proposing the importation of out-of-state waste.
> 732 F. Supp. 761, 764.
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> * * *
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> Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute.
> 732 F. Supp. at 766.
>
> * * *
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> Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility.
> 732 F. Supp. at 766.

Both courts concurred that the Solid Waste Management Act was not discriminatory in effect since it "poses no flat

prohibition against the importation of out-of-state waste into Michigan landfills." Kettlewell v. Michigan Dep't. of Natural Resources, 732 F. Supp. at 764-765 (E.D. Mich. 1990).

Just as the Western states' interests in conserving and preserving scarce water resources are relevant to the Commerce Clause inquiry and not considered as economic protectionist measures, Sporhase v. Nebraska, 458 U.S. at 953, the motives of Michigan and other states to address the waste problem must also be considered, especially in light of the Resource Conservation and Recovery Act.

Petitioner asserts that the lower courts erred by not following Dean Milk Co. v. Madison, 340 U.S. 349 (1951), Brimmer v. Rebman, 138 U.S. 78 (1891),

and Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361 (1964). Each of the cases significantly differ from the instant case in that the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests.[5] The Solid Waste Management Act is

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[5]Dean Milk, 340 U.S. at 354. "In thus erecting an economic barrier protecting a major local industry against competition from without this State, Madison plainly discriminates against interstate commerce." (Footnote omitted).

Polar Ice Cream, 375 U.S. at 375. "[The principles of Baldwin v. G.A.F. Sealing, Inc., supra] justify, indeed require, invalidation as a burden on interstate commerce at that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market."

Brimmer, 138 U.S. at 83. "It is, for all practical ends, a statute to prevent the citizens of distant states, having for sale fresh meats (beef, veal or mutton,) from coming into competition, upon terms of equality, with local dealers in Virginia."

intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect.

Further, much of the Court's concern in Dean Milk was that the ordinance of a Wisconsin municipality, if found not to violate the Commerce Clause, could result in a multiplication of preferential trade areas similar in nature to any state-wide burden on interstate commerce. In this case, all of the solid waste management plans of Michigan's 83 counties were in existence and incorporated into the state solid waste management plan at the time the lawsuit was initiated. The plans were available for court scrutiny under the Commerce Clause, but Petitioner chose

instead to challenge the statute on its face and seek summary judgment prior to any discovery or evidentiary development. The specter of each county solid waste management plan resulting in a multiplication of preferential trade areas is, therefore, not a legitimate argument that can be made by Petitioner in this case.

It should also be noted that Dean Milk held that Madison's regulation was not essential to the protection of public health and welfare. Here, we are dealing with garbage and where it is disposed--a vital matter of public health and environmental protection.

D. The Solid Waste Management Act Is Not Discriminatory On Its Face And Imposes At Most Only An Incidental Burden On Interstate Commerce.

The Solid Waste Management Act permits, but does not require, every county

in Michigan to accept out-of-county waste. It is "discriminatory" only in the very broadest sense that it takes an affirmative decision by a particular county to include out-of-county waste in its management plan, but it is plainly evident that the statute on its face simply does not contain the type of absolute facial prohibition against interstate commerce which was found to be unconstitutional in cases such as Philadelphia v. New Jersey, 437 U.S. at 619, n. 2; Hughes v. Oklahoma, 441 U.S. at 323, n. 1; and Wyoming v. Oklahoma, 60 U.S.L.W. at 4120, n. 1, and 4124, where, for example, the Court said that the challenged statute "cannot be characterized as anything but protectionist and discriminatory." Because the Solid Waste Management Act is clearly capable of operating in a consti-

tutional manner by permitting out-of-state waste to enter the state, a facial challenge cannot succeed.

The burden of establishing discrimination is on Petitioner, Hughes v. Oklahoma, 441 U.S. at 336, and, as the district court and court of appeals recognized, it has simply failed to meet its burden. Just as the statute is not facially discriminatory, neither is it discriminatory in practical effect. Respondents submit that the Michigan statute is very similar to the portions of the Nebraska statute which were upheld in Sporhase v. Nebraska, 458 U.S. 954-957.

In Sporhase this Court upheld three portions of a Nebraska statute that prohibited the withdrawal and transportation

of ground water for use in an adjoining state without the permission of a state official despite the absence of a similar requirement for intrastate transfers. The portions of the Nebraska statute which the Court found not to offend the Commerce Clause was as follows:

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit... ."
> 458 U.S. at 944.

This Court took note of the even-handedness of Nebraska's statutory scheme in that the state imposed, through an

agency, stringent controls on intrastate transfers of water from the water control district in which the appellant owned property. Sporhase v. Nebraska, 450 U.S. at 956-957. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938), cited in Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 473, n. 17. The same even-handedness is found in the Michigan statutes. But, if Petitioner's arguments in this case are accepted, the entire Nebraska statute at issue in Sporhase should have been invalidated since it clearly discriminated against interstate commerce on its face by favoring in-state users of water who were not required to

obtain state permission prior to its usage.

In Michigan, protections against parochial and arbitrary decisions by counties similar to those in the Nebraska statute are afforded by the director's power of approval of county plans, see, Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. at 45, and by the availability of judicial review, see, Dafter Twp. v. Reid, 159 Mich. App. at 169-170.

Besides the district court and court of appeals in this case, other federal courts have dealt with similar challenges to laws restricting the flow of solid waste into a politically defined area. In Evergreen Waste Systems, Inc. v. Metropolitan Service District, 820 F.2d

1482 (9th Cir. 1987), waste haulers claimed that an ordinance barring out-of-district waste from a landfill violated the Commerce Clause. In response to Evergreen's contention that the ban on waste from out-of-state was "just as arbitrary and 'facially' discriminatory as was New Jersey's ban on out-of-state waste", 820 F.2d at 1484, the court held:

> Unlike New Jersey's total ban on out-of-state waste, Metro's ordinance applies to only one of Oregon's many landfills and bars waste from most Oregon counties as well as out-of-state waste. It therefore does not fit the Court's paradigm of a per se violation: "a law that overtly blocks the flow of interstate commerce at a State's borders."
> 820 F.2d at 1484.

The court then applied the Pike balancing test found at 397 U.S. at 142.

In Diamond Waste, Inc. v. Monroe

County, 939 F.2d 941 (11th Cir. 1991), the county adopted a resolution which prohibited a private landfill operator from importing waste from outside the county. The operator's claim that the resolution violated the Commerce Clause was rejected by the Court of Appeals:

> The Monroe County resolution does not constitute sheer economic protectionism against out-of-state commerce and so is not invalid per se. The resolution treats interstate waste and intrastate waste on an equal basis. Monroe County also has legitimate legislative interests in extending the life of the only existing landfill within its jurisdiction and in protecting its residents and its environment from the increased pollution and traffic that a regional landfill would create. Indeed, many private residences are adjacent to the landfill, as are Monroe County's mental health center and an elementary school.
> 939 F.2d at 944.

The court then applied the Pike balancing test.

The statutes at issue are very similar, on their face, to the statute at issue in Sporhase v. Nebraska, 485 U.S. 941. In reaction to claims that the Nebraska statute unduly burdened interstate commerce, this Court found that while Commerce Clause concerns were implicated by the fact that the statute applied to interstate transfers but not to intrastate transfers, legitimate reasons existed for the special treatment accorded requests to transport ground water across state lines which allowed Nebraska to conserve and preserve for its own citizens a vital resource in times of severe shortage. 458 U.S. at 955-956. Restrictions imposed upon certain intrastate transfers by the Nebraska Department of Water Resources in areas where inadequate ground water supply was deter-

mined to be unavailable was, to the Court, evidence of the evenhandedness of the statute insofar as its treatment of interstate and intrastate interests:

> Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.
> 458 U.S. at 955-956.

Unlike the ground water involved in Sporhase, in which concerns arose regarding a state's effort to "hoard" a natural resource for the benefit of its citizens,[6] landfills are not a natural resource, but are manufactured facilities. Just as with the continuing

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[6]Philadelphia, 437 U.S. at 627 (citing West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

availability of water in Nebraska, availability of landfill capacity in Michigan is not happenstance based on favorable geological conditions but is a product of a comprehensive statutory scheme that mandates siting of disposal facilities to meet projected needs. Being a resource created by operation of law, Michigan landfills have the "indicia of a good publicly produced and owned in which a State may favor its own citizens." Sporhase, 458 U.S. at 957. As stated by the court in Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d at 254, in recognizing the local initiative and sacrifice necessary to address a waste problem:

> The present case is not one in which a state has "hoard[ed] resources which by happenstance are found there." Reeves, 447 U.S. at 444, 100 S. Ct. at 2281. Rather, a state subdivision has used initiative to build

> a waste disposal facility to serve its needs. Furthermore, given Lycoming's recycling program, one could say, as the Supreme Court did with respect to Nebraska's water conservation program, that "the continuing availability of [the landfill] is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." Sporhase, 458 U.S. at 957, 102 S. Ct. at 3464. We also take cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents. Neither the sacrifice of local residents in allowing a landfill to be built nearby nor the political character of much of the shortage of land available for landfill construction should be ignored.

The overall effect of the Solid Waste Management Act on interstate activity is incidental and it simply does not contain the type of absolute facial prohibition which this Cout found to be unconstitutional in cases such as Philadelphia v. New Jersey, Hughes v. Oklahoma, and

Wyoming v. Oklahoma. Rather, it more closely resembles the statute found constitutional in Sporhase.

E. There Are No Reasonable Nondiscriminatory Alternatives To Protect The Local Interests.

It is essential for planning and management of solid waste that a service area be defined. Without the statutes allowing counties to define their service areas, the problems caused by the free flow of waste will return. Without some control of the scope of the burden, communities will simply not be willing to sustain others' burdens by having their communities inundated with disposal facilities and all the attendant health and environmental risks and social costs.

The statute places upon the citizens of each county the responsibility for the

proper disposal of their waste. It requires the counties to site sufficient disposal capacity to meet at least their own needs. The counties cannot escape this burden. Recognizing that the creation of disposal capacity negatively impacts communities, the statute allows communities to indirectly control the amount of land used for disposal by controlling the flow of waste from outside the county. There is no nondiscriminatory alternative to the dual purpose served by the Solid Waste Management Act and, particularly, the statutes at issue.

It is plainly evident that the statute requires the citizens of Michigan to clean up after themselves. It forces them to make difficult decisions, but also enables them to control the amount

of waste that they must manage by enabling them to define the areas outside of their own political boundary to be served. That its purpose is not to preclude out-of-state waste from being received is evident from the existing state plan which, as Petitioner concedes, allows the receipt of out-of-state waste in various Michigan counties. It is also evident by the data presented in the "Brief for National Solid Waste Management Association as Amicus Curiae in Support of Petitioner" (see p. 5).

Assuming the strict scrutiny test was applicable and that it was Respondents' burden to show nondiscriminatory alternatives, Petitioner asserts, at pages 48-49 of its brief, that Respondents have not "exhausted all alternative means of con-

serving landfill space" by reducing the flow of all solid waste into Michigan's landfills, by imposing quantity restrictions, by requiring recycling, by prohibiting out-of-state waste at state- or county-owned landfills, or by creating additional landfill capacity. Petitioner has misstated the controlling legal standard since Respondents are not required to exhaust all possible alternative means, but must make only reasonable efforts and need only explore existing alternatives. New Energy Co. of Indiana v. Limbach, 486 U.S. at 278, said that even under strict scrutiny, a discriminatory statute can be validated by "showing that it advances a legitimate local purpose that cannot be adequately served by reasonable alternative means." (Emphasis added.) Furthermore, it is clear from

Maine v. Taylor, 477 U.S. at 147-148, that only "reasonable efforts to avoid restraining the free flow of commerce" must be made; a state "is not required to develop new and unproven means of protection at uncertain cost ... ." (Emphasis added.) There is nothing in the record to support Petitioner's speculative assumption that these alternatives are even feasible.

Furthermore, Petitioner's focus only on the purpose of "conserving landfill space" is far too narrow. As previously demonstrated in this brief, the principal purposes of Michigan's Solid Waste Management Act are to impose a mandatory duty on Michigan citizens to dispose of their own waste in an environmentally responsible way and to undertake compre-

hensive long-range planning and management obligations. In light of these legitimate purposes, Petitioner's simplistic suggestions of reducing the flow of all waste into Michigan's landfills, or at least reducing the flow of out-of-state waste at government-owned landfills, is both socially irresponsible and not a viable option.

In addition, Petitioner is simply wrong when it says that Michigan law does not impose quantity restrictions and does not require recycling and resource recovery efforts. The entire thrust of the Solid Waste Management Act is to provide a mandatory comprehensive system for estimating--and planning for--future landfill quantity requirements. Indeed, this entire lawsuit is a calculated

effort by Petitioner to evade St. Clair County's carefully-planned landfill quantity limits. The statutes cited in fn. 31 of Petitioner's brief undercut its assertions, as does Mich. Comp. Laws Ann. § 299.430a which provides that the director "shall not approve a plan update unless" it contains analysis and evaluation of recycling, composting and other processing or disposal methods and unless it either provides for recycling and composting or establishes that such programs are not necessary or feasible. Michigan, in fact, has a goal of reducing use of landfills to unusable residuals by the year 2005. Mich. Comp. Laws Ann. § 299.432(4).

Petitioner suggests that another nondiscriminatory alternative is for St.

Clair County to create more landfills to accommodate waste from outside of the county, and in doing so, implies that the citizens' "disinterest" might prevent such an alternative from occurring. It is certainly true that the opening of St. Clair County's borders to out-of-county waste would lead to the siting of more landfills or incinerators due to the obligation under the Solid Waste Management Act that the county assure sufficient disposal capacity for its waste. However, Respondents submit that St. Clair County is entitled to some control over how much of an obligation it must incur due to the burdens referred to earlier.

The alternatives suggested by Petitioner do nothing toward solving the

problem of waste and represent the status quo before RCRA and such statutes as the Solid Waste Management Act. Those statutes recognize that there is an obligation to properly manage and dispose of one's own solid waste. To the extent Michigan has capacity for the waste from other states, it has been shown that that capacity has been made available. To the extent sufficient capacity may not exist in other states, it is because of a lack of political will. This is not a matter of the states sinking or swimming together, but rather a matter of some not even getting into the water and instead choosing to dump their own problems on the others who are desperately trying to stay afloat.

Both the legislative ends and the legislative means of dealing with the

waste problem are appropriate. Michigan has created disposal capacity and is entitled to give a preference to those who have incurred the burden. Any Commerce Clause impact on Petitioner or the residents of any other state are incidental.

II.

BECAUSE OF THE MARKET PARTICIPANT DOCTRINE AND PRINCIPLES OF STATE SOVEREIGNTY, THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

When a State acts as a market regulator, its actions are subject to Commerce Clause scrutiny, but when a State acts as a market participant, the "negative" Commerce Clause simply does not come into play. Petitioner recognizes this principle, brief p. 49, n. 32.

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), examined a Maryland cash subsidy program which discriminated in favor of in-state processors. The Court analogized the State to a private purchaser and upheld the program against Commerce Clause attack by characterizing the activity as proprietary rather than regulatory in nature. The Court rejected the premise "that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden." 426 U.S. at 805. The out-of-state processor relied on several prior cases including Pike v. Bruce Church, supra, and the Court distinguished them by saying, 426 U.S. at 806: "The common thread of all these cases is that the State interfered with the natural func-

tioning of the interstate market either through prohibition or through burdensome regulation." In Alexandria Scrap, the out-of-state marketers, like Petitioner in the instant case, "are not in the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations." 426 U.S. at 810, n. 20. The Court observed, 426 U.S. at 808, that the State had entered into the market "as a purchaser, in effect, of a potential article of interstate commerce" and held, 426 U.S. at 810:

> Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.
> (Footnotes omitted.)

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court applied the market participant doctrine and held that South Dakota's policy of confining sales of state-produced cement to South Dakota residents did not violate the Commerce Clause. The Court recognized, 447 U.S. at 436, that the market participant doctrine announced in Alexandria Scrap was couched in "unmistakably broad terms," and explained, 447 U.S. at 437:

> the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. * * * There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

Reeves recognized that the fundamental principle of state sovereignty underlies all Commerce Clause analysis, 447 U.S. at 438 and n. 10:

> Restraint in this area is also counseled by considerations of state sovereignty,[10] the role of each State "'as guardian and trustee for its people,'" * * * and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."
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> ---
>
> 10. * * * Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions" --such as the employment of certain state workers--may not be subject even to congressional regulation pursuant to the commerce power. National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976). It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal. * * * (Citations and other footnotes omitted.)

The foregoing statement must be re-examined in light of the fact that the

Court relied on National League of Cities v. Usery, 426 U.S. 833 (1976), which was overruled in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), but Respondents submit that the fundamental principle of state sovereignty continues to counsel restraint in the examination of state statutes under the "negative" Commerce Clause.

Garcia held that when analyzing Congress' authority under the Commerce Clause to override a state statute, the "principal means" of protecting state sovereignty "lies in the structure of the Federal Government itself" and in the "effectiveness of the federal political process." 469 U.S. at 550-551, 552. The Court repeatedly emphasized, however, that "we continue to recognize that the

States occupy a special and specific position in our constitutional system," 469 U.S. at 556; that "The States unquestionably do 'retai[n] a significant measure of sovereign authority,'" 469 U.S. at 549; and that:

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deems state involvement to be.
> 469 U.S. at 546.

While the effectiveness of the federal political process is the principal means of protecting State sovereignty when Congress has acted, where Congress has not acted--as in the "negative" Commerce Clause context--it remains to this Court to recognize and protect the

legitimate sovereign interests of the States. See, Note: The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space, 67 Ind. L. J. 511 (Winter, 1992). Respondents submit that even after Garcia the principles of state sovereignty which were recognized and applied in Reeves, supra, 447 U.S. at 438, remain compelling. Any other result would, in the Court's words, "interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largess. * * * A healthy regard for federalism and good government renders us reluctant to risk these results." 447 U.S. at 441.

The Reeves Court also rejected the out-of-state marketers' argument that the South Dakota preference for its residents was unconstitutional "protectionist" legislation, 447 U.S. at 442:

> The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government--to serve the citizens of the State.

Finally, Reeves recognizes the existence of considerations which urge restraint in "negative" Commerce Clause challenges,

and which Respondents submit apply in the instant case, 447 U.S. at 439:

> Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, Alexandria Scrap wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

The article of commerce which was at issue in Reeves was state-manufactured cement, concerning which the Court said, 447 U.S. at 444: "It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." This theme was reiterated in Sporhase, supra, 458 U.S. at 957, where the Court cited Reeves and upheld three portions of a state statute governing withdrawal of ground water:

> Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.

Contrary to Reeves, 447 U.S. at 443, where the Court cited Philadelphia v. New Jersey, supra, 437 U.S. 617, to the effect that a landfill is a natural resource, Respondents submit that a modern landfill is not a natural resource, but is much more closely analogous to "the end product of a complex process whereby a costly physical plant and human labor act on raw materials." 447 U.S. at 444. In the instant case, because of Michigan's comprehensive Solid Waste Management Act and because of Michigan's conservation efforts, the availability of landfill space, like the availability of

ground water in Sporhase, 458 U.S. at 957, "is not simply happenstance" and instead has "the indicia of a good publicly produced and owned in which a State may favor its own Citizens in times of shortage." The comprehensiveness of the Michigan regulatory framework permits the conclusion that in the context of landfills, Michigan's laws are "a form of state participation in the free market," New Energy Co., 486 U.S. at 277. The comprehensive Michigan laws demand and enable the creation of the product being marketed--the landfill space. Under these circumstances, Michigan is acting as a market participant and not a market regulator, and therefore the challenged statutes do not violate the Commerce Clause.

CONCLUSION

Respondents Michigan Department of Natural Resources and its Director, request that that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Table of Contents

Page

Administrative Rules
Michigan Administrative Code,
1982 Annual Supplement
R 299.4711 ..... 1a

Respondents' Response to
Petitioner's Appendix Comments 13a

R 299.4711 Plan format and content.

Rule 711. To comply with the requirements of the act and to be eligible for 80% state funding, county solid waste management plans shall be in compliance with the following general format and shall contain the following elements:

(a) An executive summary, which shall include all of the following:

(i) An overview.

(ii) Conclusions.

(iii) Selected alternatives.

(b) An introduction as follows:

(i) The introduction shall establish the goals and objectives for the prevention of adverse effects on the public health and the environment resulting from improper solid waste collection, transportation, processing, or disposal,

including the protection of ground and surface water quality, air quality, and land quality.

(ii) The introduction shall also establish the goals and objectives for the maximum utilization of Michigan's solid waste through resource recovery, including source reduction and source separation.

(c) A data base that includes all of the following:

(i) An inventory and description of all existing facilities where solid waste is being transferred, treated, processed, or disposed of, including all of the following:

(A) Physical location, size, and a delineation of private and public facilities.

(B) A description of solid waste

type, volume or weight received, and current capacity.

(C) Deficiencies.

(ii) An evaluation of existing solid waste collection, management, processing, treatment, transportation, and disposal problems by type and volume, including residential and commercial solid waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other solid wastes from industrial or municipal sources, but excluding hazardous wastes.

(iii) Demographics of the county:

(A) Current and projected population densities and centers for 5- and 20-year periods.

(B) Identification of current and projected centers of solid waste generation, including industrial wastes

for 5- and 20-year periods.

(iv) Current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods.

(d) Solid waste management system alternatives shall address the problems identified in subdivision (c)(ii) of this rule and shall include both of the following:

(i) Solid waste management components, including all of the following:

(A) Resource conservation including source reduction.

(B) Resource recovery including source separation, materials, energy, and markets.

(C) Volume reduction.

(D) Sanitary landfill.

(E) Collection.

(F) Transportation.

(G) Ultimate disposal area uses, including recreational potential.

(H) Institutional arrangements.

(ii) Development of alternative systems which address all the solid waste management components. Each alternative system shall evaluate public health, economic, environmental, siting, and energy impacts. Capital, operational, and maintenance costs shall be developed for each alternative system.

(e) Plan selection shall be based on all of the following:

(i) An evaluation and ranking of proposed alternative systems, including all of the following:

(A) Technical feasibility for 5- and 20-year periods.

(B) Economic feasibility for 5- and 20-year periods.

(C) Access to land for 5- and 20-year periods.

(D) Access to transportation networks to accommodate the development and operation of solid waste transporting, processing, and disposal facilities for 5- and 20-year periods.

(E) Effects on energy for 5- and 20-year periods; production possibilities and impacts of shortages on solid waste management systems.

(F) Environmental impacts over 5- and 20-year periods.

(G) Public acceptability.

(ii) The selected alternative shall meet all of the following requirements:

(A) Include the basis for selection, a summary of evaluation, and ranking.

(B) Include advantages and disadvantages of the selected plan for all of the following factors:

(1) Public health.

(2) Economics.

(3) Environmental effects.

(4) Energy use.

(5) Siting problems.

(C) Be capable of being developed and operated in compliance with state laws and rules of the department pertaining to the protection of the public health and environment considering the available land in the planning area and the technical feasibility of, and economic costs associated with, the alternative.

(D) Include a timetable for implementing the solid waste management plan.

(E) Be consistent with and utilize population, waste generation, and other

planning information prepared under the provisions of section 208 of Public Law 92-500, 33 U.S.C. 1288.

(iii) Site requirements, including the following requirements:

(A) The selected alternative shall identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update.

(B) If specific sites cannot be identified for the remainder of the 20-year period, the selected alternative shall include specific criteria that guarantee the siting of necessary solid waste disposal areas for the 20-year period subsequent to plan approval.

(C) A site for a solid waste disposal area that is located in one county, but serves another county, shall be identified in both county solid waste manage-

ment plans.

(f) Management component. Each solid waste management plan prepared pursuant to the act shall contain a management component which identifies management responsibilities and institutional arrangements necessary for the implementation of technical alternatives. At a minimum, this component shall contain all of the following:

(i) An identification of the existing structure of persons, municipalities, counties, and state and federal agencies responsible for solid waste management, including planning, implementation, enforcement, and an assessment of all of the following:

(A) Technical and administrative capabilities.

(B) Financial capabilities

(C) Legal capabilities.

(ii) An identification of gaps and problem areas in the existing management system which must be addressed to permit implementation of the plan.

(iii) A recommended management system for plan implementation, which shall consist of all of the following elements:

(A) An identification of persons, municipalities, counties, and state and federal agencies assigned responsibilities under the plan, with a precise delineation of planning, implementation, and enforcement responsibilities, including legal, technical, and financial capability for all entities assigned responsibilities.

(B) A process for ensuring the ongoing involvement of and consultation with the regional solid waste management plan-

ning agency.

(C) A process for ensuring coordination with other related plans and programs within the planning area, including, but not limited to, land use plans, water quality plans, and air quality plans.

(D) An identification of necessary training and educational programs, including public education.

(E) A strategy for plan implementation, including the acceptance of responsibilities from all entities assigned a role within the management system.

(F) A financial program that identifies funding sources for entities assigned responsibilities under the plan.

(g) Documentation of public participation as follows:

(i) A record of attendance shall be maintained and included in an appendix to the plan.

(ii) Citizen concerns and questions shall be considered and responded to in the plan's appendix.

The following corrects or clarifies certain "comments" regarding county plans offered by Petitioner in its appendix.

Kalamazoo County -- Petitioner's comment is based on language from a draft plan and not from the existing county plan. The current plan does not make any such statement regarding exlusion of out-of-state-waste.

Lapeer County -- Language in the county plan attempting to prohibit out-of-state waste was stricken from the plan by order of the director of the Department of Natural Resources on October 3, 1991. The county deleted the language and replaced it with the following:

> Page III-2, 2nd paragraph: Delete the paragraph and replace it with the following language.
>
> Inter-county waste flows have been explicitly authorized by formal

> amendment of the Lapeer County Solid Waste Management Plan. In no event, and notwithstanding any separate agreements, shall any solid waste be disposed of in Lapeer County which originates in any county other than those permitted pursuant to the authorization specified in the attached amendment.

Ontonagon County -- The language quoted was not approved by the director of the Department of Natural Resources and the plan was amended to replace it with specific importation limitations. The amendment, dated August 21, 1991, reads:

> III. The Ontonagon County Solid Waste Management Plan, as drafted by the County, authorized importation into Ontonagon County from anywhere in Michigan or Wisconsin. Sources of wastes imported into a county must be identified and quantified by specific points of origin. The Ontonagon County Solid Waste Management Plan is amended to specifically authorize the service area as attached, quantified by volume at point of origin.

Four Wisconsin counties are specifically identified in the plan, as well as other

Michigan counties, along with the expected volume of waste per day from each county.

Tuscola County -- The statement referred to by Petitioner regarding out-of-state waste is found in the background portion of the county plan. The language is not found in the selected plan portion of the county plan which is the portion which regulates such transactions.

VanBuren County -- The county plan referenced was adopted prior to the amendments to the Solid Waste Management Act at issue. At the time of adoption, there was no requirement that the disposal of waste from out-of-state sources be authorized by a county plan. Therefore, there was no reason for the county to provide for the importation of out-of-

state waste and, thus, there was no specific reference to such waste.